



October 9, 2002

Mr. Wiley B. McAfee
Police Legal Adviser
Irving Police Department
305 North O'Connor Road
Irving, Texas 75061

OR2002-5722

Dear Mr. McAfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170448.

The Irving Police Department (the "department") received a request for copies of information pertaining to a specified incident. You state that you have released "basic information" from a responsive offense report to the requestor. *See* Gov't Code § 552.108(c) (stating basic information regarding crime not excepted from disclosure under Gov't Code § 552.108); *see also Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information, including detailed description of offense). You also state that you do not maintain a copy of the requested complaint.¹ You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101 and 552.108

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

of the Government Code.² We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that portions of Exhibit C are not responsive to the request. Accordingly, we need not address whether the marked information in Exhibit C is subject to disclosure under the Public Information Act.

You claim that the remaining portions of Exhibit C are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.³ Section 143.089 contemplates two different types of personnel files, one that the city is required to maintain as part of the department officer's civil service file, and one that the department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The civil service file must contain certain specified items, including documents relating to any misconduct in those cases where the department took disciplinary action against the officer. *See id.* § 143.089(a)(2). However, documents relating to any alleged misconduct or disciplinary action taken must be removed from the civil service file if the department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See id.* § 143.089(b), (c). Information that reasonably relates to an officer's employment relationship with the department and that is maintained in a department's internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.-- San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied). Thus, subsections (a)-(c) limit the contents of the civil service file.

Subsection (g) authorizes, but does not require, the department to maintain for its use a separate and independent, internal personnel file on an officer. Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's

² Although the department did not claim that any portion of the requested information was excepted from disclosure pursuant to section 552.101 of the Government Code within ten business days of the department's receipt of the written request, we will address the department's claim under section 552.101 since such a claim constitutes a compelling interest that is sufficient to overcome the existing presumption that the requested information is now public. *See* Gov't Code §§ 552.301(b), .302; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Local Gov't Code § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the department for its use and addressed the applicability of section 143.089(g) to that file. In that case, the records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. *See id.* The court determined that section 143.089(g) made these records confidential. *See id.* at 949. You state that internal affairs records, such as those submitted to us for review as Exhibit C, are part of an officer's departmental file and, as such, are confidential. Thus, we understand the department to contend that Exhibit C is maintained within a departmental file maintained by the department that pertains to the officer who was the subject of this complaint. We, therefore, agree that the remaining information in Exhibit C is confidential under section 143.089(g) of the Local Government Code and, thus, must be withheld from disclosure pursuant to section 552.101 of the Government Code.

You also claim that Exhibit D is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted . . . if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2). Section 552.108(a)(2) protects records from disclosure pertaining to criminal investigations or prosecutions that have concluded in a final result other than conviction or deferred adjudication. Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the criminal investigation that was the subject of Exhibit D has finally concluded in a result other than conviction or deferred adjudication. As you state that you have already released basic information to the requestor, we conclude that the department may withhold the remaining portions Exhibit D from disclosure pursuant to section 552.108(a)(2) of the Government Code.

In summary, we need not address whether the marked information in Exhibit C is subject to disclosure under the Public Information Act. The department must withhold the remaining information in Exhibit C from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The department may also withhold the remaining information in Exhibit D from disclosure pursuant to section 552.108(a)(2) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

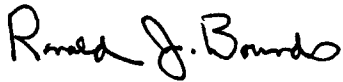
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald J. Bounds". The signature is fluid and cursive, with the first name "Ronald" and last name "Bounds" clearly distinguishable.

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 170448

Enc. Marked documents

cc: Mr. Frank Etienne
2018 Cooper Drive
Irving, Texas 75061
(w/o enclosures)